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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

February 7, 1997

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket Nos. 91-221 and 87-7
Second Further Notice of Proposed Rule Making
Policies and Rules Concerning Local Television Ownership and Television Satellite Stations

Dear Mr Caton:

On behalf of CBS Inc., enclosed herewith for filing with the Commission are an original and eleven copies of *Comments of CBS Inc.* in response to the Commission's *Second Further Notice of Proposed Rule Making* in the above referenced proceeding.

Should there be any questions concerning this filing, please contact the undersigned at (202) 457-4515.

Respectfully submitted,

CBS Inc.

By: ______________________
Stephen A. Hildebrandt, Esq.
Associate General Counsel and Assistant Secretary
CBS Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations	)	
Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations	)	
Review of Policy and Rules	)	MM Docket No. 87-7

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

COMMENTS OF CBS INC.

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February 7, 1997

TABLE OF CONTENTS

SUMMARY

Broadcasters today face a daunting array of competitive challenges: an abundance of existing and emerging subscriber-based multichannel services, both wired and wireless, competing for audiences and advertising dollars; the entry of extraordinarily well-financed telephone companies into the business of video distribution; the exploding development of computer-based information and entertainment services, and of information delivery to the home via the Internet; the imminent conversion of television service to the new technical standards of advanced digital television; and the anticipated migration of radio service to digital audio broadcasting -- to name just a few. If free broadcasting is to be preserved as a vital force in this country's media landscape -- an objective we believe to be of signal public importance -- broadcasters must be permitted to achieve ownership efficiencies essential to effective competition.

CBS believes that the exhaustive record in this proceeding, together with the conclusions of the Congress in adopting the Telecommunications Act of 1996 ("1996 Act"), decisively justify the repeal or substantial liberalization of the Commission's radio-television cross-ownership ("one-to-a-market") rule, which operates today solely to impede effective competition by over-the-air broadcasters.

In the 1996 Act, Congress determined that the advantages of permitting common ownership of up to eight radio stations (no more than five of which may be in any one service) in large markets could be realized without raising any significant concerns as to diversity or competition. The Commission, too, has concluded after repeated examination of the issue that "combined efficiencies derived from common ownership of radio and television stations in local

broadcast markets and from common ownership of same service radio stations ... would strengthen the competitive standing of combined stations," and could "enabl[e] such stations to invest additional resources in programming and other service benefits provided to the public." The question before the Commission, therefore, is whether, and to what extent, "one-to-a-market" regulation need be perpetuated. We respectfully submit that broadcasters should now be permitted to realize -- and provide to their audiences and advertisers -- the benefits which all agree would flow from deregulation, since neither competition nor diversity would be jeopardized by the rule's elimination.

With respect to competition, a study by Economists Incorporated being submitted herewith (the "Local Market Study") demonstrates that repeal of the rule would create no risk of significant anticompetitive combinations in the top 50 markets, even in the highly unlikely event that all the broadcast stations in a market were combined up to the limits allowed by the 1996 legislation. Based on the assumption that all of the television and radio broadcast stations in each of the top 50 markets are combined in groups of one television station and up to eight radio stations, the Local Market Study analyzes the resulting market concentration in each of those markets. The result of this analysis is dramatic: in most of the top 50 markets, the predicted Herfindahl-Hirschman Index ("HHI") is below the level that, as a practical matter, is likely to generate any antitrust concern; in the remainder, it barely reaches that level.

Moreover, because of several extremely conservative assumptions in the Local Market Study, even these modest HHI levels significantly overstate the predictable competitive effects of radio-television combinations following the elimination of the one-to-a-market rule. First, the levels of concentration the Study reports ignore all advertising alternatives other than radio or television broadcast stations, despite abundant evidence that radio and television stations in fact compete with a wide variety of other media in the sale of local advertising. Secondly, as noted above, the calculations in the Local Market Study assume that, following repeal of the one-to-a-market rule, all of the television stations in a market would combine with the maximum allowable number of radio stations in that market -- a level of aggregation which is improbable in the extreme. Particularly in view of the highly conservative assumptions underlying its analysis, the Study provides impressive support for the proposition that repeal of the rule would have no cognizable adverse impact on competition in the top 50 markets. And even in the highly unlikely event that any proposed radio-television combination might raise unique competitive issues in a particular market, the ordinary process of pre-merger review by the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino procedures is fully capable of identifying and rectifying any competitive problem.

Nor is there any basis for concern that repeal of the rule would meaningfully diminish viewpoint or programming diversity. An extraordinary array of information and entertainment outlets are today available in local markets throughout the United States. Given the enormous number and variety of offerings, it is self-evident that no group owner of a television and radio stations could hope to dominate debate on public issues in its community with a single viewpoint, even if it set out to do so. In any event, it is highly unlikely that any large media owner would attempt such a course, since it is plainly in the economic self-interest of such large media companies to present material that speaks to a wide range of audiences.

For these reasons, CBS believes that the record irrefutably supports repeal of the rule. If the Commission nonetheless determines to retain it in some form, we think it clear that any concerns as to competition or diversity can be fully satisfied by allowing radio-television combinations up to the limits provided in the 1996 Act in any market that satisfies a minimum independent voices test. We further submit that this minimum voices test should be reduced from 30 to no more than 20 broadcast voices, and that such combinations should be allowed in these markets as a matter of rule rather than waiver.

In this regard, the Local Market Study also examined the effect on concentration if hypothetical combinations of radio and television stations in the top 50 markets were stopped when 20 separate broadcast voices remained in the market. Not surprisingly, the levels of concentration that could hypothetically result from a rule which permitted all radio-television mergers which did not reduce the number of independent broadcast voices below 20 are even lower than the levels reported when all possible combinations were assumed to have been consummated -- with even the highest figure still being quite modest by merger standards. Moreover, since the Study intentionally overstates competitive risk through the extremely conservative assumptions noted above, the modest levels of concentration it reports decisively demonstrate that a 20-voice rule -- *i.e.*, a rule permitting all radio-television combinations up to the statutory limit, so long as at least 20 broadcast voices remained in the market following a proposed transaction -- would necessarily relieve the Commission of any possible concern as to significant risks to competition or diversity. There is accordingly no basis for denying the benefits of such a rule to broadcast station owners in <u>any</u> market, regardless of its market rank, in which the designated "voices" test is satisfied. And such a rule should be equally applicable to any television owner (or proposed owner) which also proposes to own or acquire the full complement of radio stations in a particular market allowed by the Commission's rules. There is no reason why existing or proposed owners of radio-television combinations should be required to overcome special regulatory hurdles -- including the present "five factors" test -- in order to take advantage of the enhanced efficiencies made possible by the liberalization of the local radio ownership rules in the 1996 Act.

As noted above, we believe that any proposed television or radio acquisition which meets whatever test may ultimately be adopted by the Commission should be permitted as a matter of rule, rather than waiver. Most particularly, we oppose introducing new variables to any waiver test, such as audience shares and advertising revenues. The wide fluctuation in audience and revenue shares make clear that these factors cannot be used to predict stations' market rankings over any period of time, and are of no value to the Commission in analyzing the probable effects of station consolidations on competition and diversity.

CBS also believes that the television local ownership ("duopoly") rule should be modified to permit common ownership of stations if they are in different DMAs. The record clearly establishes that television stations in different DMAs do not meaningfully compete with each other for viewers, advertising, or program exhibition rights. And since this is true regardless of whether such stations have overlapping Grade A contours, there is no need to add this latter component as part of a test for allowing common ownership under a modified duopoly rule. Similarly, because there is no reason to make a revised rule more restrictive than its predecessor, common ownership should also continue to be permitted in the relatively unusual circumstance in which a particular DMA is so large as to include two stations whose Grade B contours do not overlap.

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SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

COMMENTS OF CBS INC.

CBS Inc. ("CBS"), a wholly owned subsidiary of Westinghouse Electric Corporation, by its attorneys, respectfully submits these comments in response to the Second Further Notice of Proposed Rule Making ("Second Further Notice")[1] in the above-captioned dockets, which the Commission has issued in order to bring to fruition its ongoing reexamination of its local broadcast ownership rules.

[1] FCC 96-438 (released November 7, 1996).

INTRODUCTION

In a series of Notices commencing in 1991, the Commission has recognized the need to reform outdated structural regulations that needlessly handicap broadcasters from competing effectively in a transformed communications universe. Through these Notices, it has pursued a wide-ranging review of the purposes and effects of its structural ownership rules, and compiled a voluminous record of commentary and data.[2] The Commission now has the benefit as well of the determinations of the Congress in the Telecommunications Act of 1996 (the "1996 Act"),[3] which effected significant changes in the regulation of broadcast media ownership -- including, among other things, substantial liberalization of previous constraints on television ownership at the national level, and of radio ownership at both the national and local levels -- and also set the stage for the emergence of still another powerful new competitor to the broadcast industry by permitting telephone companies and cable systems to compete with each other in their respective businesses.

In the Second Further Notice, the Commission seeks to supplement the extensive record assembled to date in light of its review of materials submitted in prior phases of this

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[2] The record before the Commission includes, *inter alia*, the comprehensive report on broadcast television issued by the Commission's Office of Plans and Policy in 1991, which examined changes in the video marketplace since 1975, Broadcast Television in a Multichannel Marketplace, Office of Plans and Policy Working Paper No. 26, DA 91-817, 6 FCC Rcd 3996 (1991) ("OPP Report"); numerous responses to the Commission's 1991 Notice of Inquiry soliciting public comment on that report, 6 FCC Rcd 4961 (1991); numerous comments in response to the Commission's Notice of Proposed Rulemaking in the instant proceeding, 7 FCC Rcd 4111 (1992), in which the Commission "propose[d] alternative means of lessening the regulatory burden on television broadcasters as they seek to adapt to the multichannel video marketplace," including relaxation of the national and local restrictions on television station ownership; and numerous comments in response to the Commission's Further Notice of Proposed Rule Making in the instant proceeding, 10 FCC Rcd 3524 (1995) ("Television Ownership Further Notice"), in which the Commission proposed a "new analytical framework" within which to evaluate its broadcast ownership rules.

[3] Pub. L. No. 104-104, 110 Stat. 56 (1996).

proceeding and of the changes effected in the 1996 Act, as a prelude to its issuance of a Report and Order.[4] Having commented at length on the multitude of questions raised in the earlier Notices, CBS confines its remarks here to additional observations regarding certain new proposals set forth in the Second Further Notice relating to the Commission's radio-television cross-ownership ("one-to-a-market") and television local ownership ("duopoly") rules. In addition, in response to the Commission's request for additional data and economic analysis as to the potential effects of repeal or substantial relaxation of the one-to-a-market rule on competition and diversity in local markets, CBS submits with these comments a study it has commissioned from Economists Incorporated, which evaluates these issues in light of the 1996 Act.[5] The Local Market Study submitted herewith supplements the extensive Joint Economic Study commissioned in 1995 by CBS, Capital Cities/ABC, Inc., National Broadcasting Company and Westinghouse Broadcasting Company, to respond to the Commission's requests in its Television Ownership Further Notice for detailed data regarding the markets in which broadcast stations compete, and for assessment of its proposed new analytical framework for the examination of ownership restrictions.[6]

CBS believes that the exhaustive record in this proceeding, together with the conclusions of the Congress in the 1996 Act, decisively justify the repeal or substantial liberalization of structural ownership constraints that were designed for marketplace

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[4] Second Further Notice at ¶ 4.

[5] Television-Radio Cross Ownership, Concentration and Voices in the Top 50 DMAs, *Economists Incorporated* (February 7, 1997) ("Local Market Study").

[6] An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, *Economists Incorporated* (May 17, 1995) ("Joint Economic Study").

conditions which vanished long ago, and operate today solely to impede effective competition by over-the-air broadcasters. We believe it demonstrates as well the wisdom of clear and unambiguous rules, of general and predictable application, with respect to any ownership regulations the Commission may determine to retain. It is common ground that broadcasters today face a daunting array of competitive challenges: an abundance of existing and emerging subscriber-based multichannel services, both wired and wireless, competing for audiences and advertising dollars; the entry of extraordinarily well-financed telephone companies into the business of video distribution; the exploding development of computer-based information and entertainment services, and of information delivery to the home via the Internet; the imminent conversion of television service to the new technical standards of advanced digital television; and the anticipated migration of radio service to digital audio broadcasting -- to name just a few. We believe it is also common ground that the preservation of free broadcasting as a vital force in this country's media landscape is an objective of signal public importance. If that objective is to be realized, broadcasters must be permitted to achieve ownership efficiencies essential to effective competition, and to have access to capital on competitive terms in efficient transactions with predictable regulatory outcomes. In the proceeding now concluding with this Second Further Notice, the Commission has the occasion to take important steps toward rationalizing a regulatory system which currently operates to impede broadcasters' ability to fulfill these needs, with no measurable offsetting benefit to the public interest. We urge the Commission to seize the opportunity to do so.

I. THE RADIO-TELEVISION CROSS-OWNERSHIP ("ONE-TO-A-MARKET") RULE.

Both the Commission and the Congress have found substantial benefits to the public interest in some consolidation of broadcast radio and television ownership in today's burgeoning media marketplace. In the 1996 Act, Congress determined that the advantages of permitting common ownership of up to eight radio stations (no more than five of which may be in any one service) in large markets could be realized without raising any significant concerns as to diversity or competition. Congress further indicated in the 1996 Act its approval of the Commission's liberal waiver policy with respect to the one-to-a-market rule, and directed that this policy be extended from the top 25 to the top 50 markets.[7] The legislative history of the Act also expressly reflected Congress's recognition that exploding competition in the media merketplace would justify relaxation of the rule beyond that specifically mandated in the statute.[8] In addition, in granting numerous requests for waivers of the rule since its adoption of the current waiver policy in 1989, the Commission has repeatedly found substantial public interest benefits from joint ownership of television and radio stations in the same market. The question before the Commission, therefore, is whether, and to what extent, "one-to-a-market" regulation need be perpetuated in this environment.

The existing record in this proceeding, as well as the accompanying Local Market Study, forcefully demonstrate that the markets in which broadcast radio and

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[7] Telecommunications Act of 1996, Section 202(d).

[8] Conference Report, Telecommunications Act of 1996, Report No. 104-230, 104th Cong. 2d Sess. (February 1, 1996) ("1996 Act Conference Report").

television stations operate are robust and competitive, and would remain so following combinations which might occur if the one-to-a-market rule were eliminated. For reasons discussed at length in CBS's previous comments and further explored below, it is also clear that the marketplace of ideas in which radio and television stations operate is extraordinarily diverse, and that common ownership in a local market of a television station and the maximum number of radio stations permitted to be jointly owned under the 1996 Act would have little impact on the availability to that community of a wide array of programming options and expressions of opinion. CBS submits, therefore, that the evidence is overwhelming that the one-to-a-market rule is an unnecessary and unjustifiable regulatory constraint which should now be repealed. If, however, the Commission ultimately concludes that some version of the rule must remain, we strenuously urge that the adoption of a simple, straightforward "voices" test would more than satisfy any lingering concerns the Commission may have regarding the protection of competition and diversity, and best fulfill the critical goals of certainty and clarity in the application and administration of the Commission's rules.

A. THE ONE-TO-A-MARKET RULE SHOULD BE REPEALED.

1. <u>The Benefits of Radio-Television Cross-Ownership To The Public Interest Are Clear.</u>

As noted in the Second Further Notice, the Congress, in liberalizing the local radio ownership rules, found that greater consolidation of radio ownership could benefit the public. The Commission now inquires whether these benefits would also extend to common ownership of a television station and the full complement of radio stations that would otherwise be allowed under the new radio limits.[9]

The benefits of combined radio-television ownership have long been a significant element in the Commission's evaluation of requests for waivers of its current cross-ownership rule. Indeed, one of the five criteria of the current "case-by-case" waiver standard relates specifically to the potential public service benefits of joint operation of the facilities involved in the merger.[10] Since its adoption of the waiver standard, the Commission has approved numerous waivers to permit joint ownership of television and radio stations in a single market,[11] and in each of these decisions, has evaluated the applicant's showings as to the potential public interest benefits of the intended combination. After repeated examination of the issue, it has concluded that "combined efficiencies derived from common ownership of radio and television stations in local broadcast markets and from common ownership of same service radio stations in local markets [are] presumptively beneficial and would strengthen the competitive standing of combined stations."[12] It has also specifically concluded that such common ownership

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[9] Second Further Notice at ¶ 70.

[10] Second Further Notice at ¶ 59, n. 101.

[11] See *e.g.*, Moosey Communications Inc., 8 FCC Rcd 5247 (1993); KVI Inc. ,9 FCC Rcd 1330 (1994); BREM Broadcasting, 9 FCC Rcd 1333 (1994); Golden West Broadcasters, 10 FCC Rcd 2081 (1995); Tak Communications Inc., 10 FCC Rcd 2564 (1995); First Broadcasting Co., 10 FCC Rcd 2904 (1995); Secret Communications Ltd., 10 FCC Rcd 6874 (1995); 1310 Inc., 10 FCC Rcd 7228 (1995); Alta Gulf FM Inc., 10 FCC Rcd 7750 (1995); Big Ben Communications, 10 FCC Rcd 8129 (1995); Atlantic Morris Broadcasting, Inc., 10 FCC Rcd 9495 (1995); River Cities Broadcasting, Corp., 10 FCC Rcd 10620 (1995); Network Properties of America, Ltd., 10 FCC Rcd 12413 (1995); Henry Broadcasting Co., 11 FCC Rcd 1175 (1995); Newmountain Broadcasting II Corp., 11 FCC Rcd 2344 (1996); Joe Morrell, Inc., 11 FCC Rcd 3589 (1996); Louis C. DeArias, Receiver 11 FCC Rcd 3662 (1996); Capital Cities/ABC, Inc., FCC 96-48, February 8, 1996; US Radio Stations, L.P., DA 96-734, May 17, 1996

[12] Golden West Broadcasters, 10 FCC Rcd 2081, 2084 (1995).

could "enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public."[13]

Pursuant to waiver or "grandfathered" status, CBS has long operated radio-television combinations in such major markets as New York, Los Angeles, Chicago, Philadelphia, San Francisco, Boston, Minneapolis and Pittsburgh. The operations of these stations over a period of many years underscore the substantial advantages to the public which cross-ownership can provide. Among the key benefits which common ownership of the CBS stations has afforded are the following:

- Radio stations have access to the technical newsgathering facilities of the television stations, allowing dramatic improvements in the reporting of news stories from remote locations, the rapid transmission of stories back to the stations, and opportunities for live broadcasts from remote locations. In CBS's case, use of such equipment is routine, for example, in San Francisco, Boston, and Philadelphia.

- The radio stations have access to the sophisticated weather forecasting equipment of the television stations on a 24-hour basis. Weather services are provided exclusively by CBS television stations to its radio stations in Los Angeles, Chicago and San Francisco, with extensive on-air use of television weathercasters on the radio stations. This is not only a cost

[13] Id.

benefit, but also gives radio listeners weather information from a full-service weather reporting center with exclusive focus on the local area, rather than from an outside national service.

- Radio and television stations share reporters, producers and editors to provide broader and deeper coverage of community issues and events, especially in times of emergency. In CBS's case, there is currently extensive sharing of reporters and news services in Boston, Philadelphia and San Francisco, and some sharing in Los Angeles and Chicago.

- The combined operation of radio and television news facilities permits continuous and varied news coverage from the home to the car to the workplace, affording to listeners and viewers a source of seamless information on events and issues of importance to them. In San Francisco, for example, reporters who provide information on issues such as medicine, law, and business during the morning television newscasts move thereafter to the radio station, to provide more in-depth reports and host talk/call-in shows on these subjects throughout the day.

- The reach and power of public service campaigns is dramatically expanded through the combination of radio and television efforts. Radio and television typically reach people at different times of the day in different locations, and different radio stations serve varied audiences, from music lovers to sports fans to talk/call-in program participants. Expanding such current single-station campaigns as "Thanks to Teachers," "African-American History Month," and "Project Safe Baby" to more stations in different services clearly produces more substantial combined efforts for these worthwhile public service efforts. CBS has seen this to be the case, for example, in its Children's Hospital fund-raising campaigns in Boston and Pittsburgh.

- Music radio stations have access to the all-news and information capabilities of their television and all-news sister radio stations. Cost considerations generally make it impossible for stand-alone music radio stations to maintain in-house news operations of any size or scope. As the experiences of CBS stations in New York, Philadelphia and Los Angeles attest, the availability of these services from a sister television station or all-news radio station decidedly enhances the depth and breadth of news available to music listeners.

- Advertisers experience tangible benefits from common ownership, including new or improved program offerings on which to advertise and new products and services from which to choose, including one-stop shopping, cross-promotions, and seasonal advertising spots.

As noted above, the Commission has repeatedly recognized the public interest benefits flowing from joint ownership in deciding waiver applications, including two recent applications involving CBS.[14] In these latter two proceedings, CBS demonstrated in detail that the operation of the radio stations in conjunction with a television station would lead to substantial efficiencies, projecting millions of dollars of potential cost savings through consolidation of station functions and physical station operations. The Commission found that the cost savings and economic efficiencies of joint operation were, in fact, significant,[15] and would result in such public interest benefits as "expanded, continuous and varied news coverage, and ...[access by] the radio stations ... to the news gathering and weather forecasting equipment and facilities of the television stations." It also found that the proposed common ownership would promote the production and broadcast of public interest programming, and the "dedicat[ion of] greater resources to the promotion and execution of community service projects."[16] These conclusions with respect to the recent waiver requests submitted by Westinghouse/CBS are merely illustrative of the Commission's findings in many other waiver cases, and support its prediction in the Second Report and Order that "combining radio and television operations will result in programming benefits."[17] CBS submits that this extensive, well-documented record of advantages to the public interest amply

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[14] Stockholders of CBS Inc., 11 FCC Rcd 3733 (1995) at 3772, appeal pending sub nom. Alexander J. Serafyn v. FCC, No. 95-1385 (D.C. Cir.); Stockholders of Infinity Broadcasting Corporation, FCC 96-495 (December 26, 1996) ("Stockholders of Infinity").

[15] Stockholders of Infinity at ¶ 36.

[16] Stockholders of Infinity at ¶ 37.

[17] Second Report and Order in MM Docket No. 87-7, 4 FCC Rcd 1741, at 1748.

supports repeal or liberalization of the "one-to-a-market" rule to extend these efficiencies and programming benefits to as many radio stations as permitted under the limits established by Congress in the 1996 Act.

The legislative history of the 1996 Act clearly set forth Congress's findings that the extent of competition and diversity in the radio industry justified liberalization of the limits on consolidated ownership. It also noted with favor the Commission's radio-television cross-ownership waiver policy, and directed the Commission to extend this policy from the top 25 to the top 50 markets. In addition, Congress took specific note of the instant ongoing ownership rulemaking proceeding, and encouraged the Commission to take cognizance of the increased competition in the radio marketplace -- competition which persuaded it substantially to relax the numerical limits on local radio station ownership -- in its overall reconsideration of the one-to-a-market rule. In the Conference Report which accompanied the legislation, Congress noted:

> Section 202 (d) directs the Commission to extend its waiver policy with respect to its one-to-a-market ownership rules to any of the top 50 markets. The Commission now generally bans cross-ownerships of radio and television stations in the same market, but has implemented a waiver policy which recognizes the potential for public interest benefits of such combinations when bedrock diversity interests are not threatened. The conferees, in adopting subsection (d), intend to extend the benefits of this policy to the top 50 markets. Also, in the Commission's proceeding to review its television ownership rules generally, the Commission is considering whether generally to allow such local cross-ownerships, including combinations of a television station and more than one radio station in the same service. The conferees expect that the Commission's future implementation of its current radio-television waiver policy, as well as any changes to its rules it may adopt in its pending review, will take into account the increased competition and the need for diversity in today's radio marketplace that is the rationale for subsection (d).[18]

[18] Telecommunications Act of 1996, Section 202(d); Conference Report at 163.

In short, in enacting this legislation, Congress clearly recognized -- as did the Commission in its Second Report and Order seven years earlier -- that there are substantial benefits to common ownership of radio and television stations in the same community. The Conference Report plainly reflects Congress's expectation that in weighing these benefits, the Commission would permit common ownership up to the new local radio ownership limits, as long as "bedrock diversity interests are not threatened." As discussed below, neither robust competition nor any "bedrock diversity interests" would be jeopardized by such deregulation. Accordingly, broadcasters should now be accorded the opportunity to realize, and to provide to their audiences and advertisers, the benefits of the efficiences which all agree would flow from this change in the Commission's rules.

2. Repeal of the One-To-A-Market Rule Would Have No Adverse Effect on Competition in Local Markets.

To assist the Commission in evaluating the effects of radio-television combinations on competition and diversity in local markets, CBS asked Economists Incorporated to undertake an empirical analysis of the possible consequences of repeal or substantial liberalization of the one-to-a-market rule in light of the changes in permissible radio ownership effected by the 1996 Act. The Local Market Study demonstrates that repeal of the Rule would create no risk of significant anticompetitive combinations in the top 50 markets, even in the highly unlikely event that all the broadcast stations in a market were combined up to the limits allowed by the 1996 legislation.

The Local Market Study assumes that all of the television and radio broadcast stations in each of the top 50 markets are combined in groups of one television station and up to eight radio stations, to the maximum extent possible in each market. It then shows the resulting market concentration in each of those markets, making various simplifying assumptions that, on balance, result in higher concentration levels than would likely be generated by repeal of the rule. The results of this analysis are dramatic: in all 50 markets, the concentration levels produced by even this unrealistically aggressive analysis are modest, with 30 of the top 38 markets producing an HHI below 1800, and the highest HHI a relatively low 2338.[19] In all but three of the top 50 markets, the Local Market Study produces HHI levels below 2200.

Because of several extremely conservative assumptions in the Local Market Study, even these modest HHI levels significantly overstate the predictable competitive effects of radio-television combinations following the elimination of the one-to-a-market rule. First, the levels of concentration the Study reports ignore all advertising alternatives other than radio or television broadcast stations. There is abundant evidence, however, that radio and television stations in fact compete with a wide variety of other media in the sale of local advertising. Cable television, for example, although excluded from the hypothetical product market in the Local Market Study, is a rapidly expanding outlet for advertising at both the national and local levels. In view of its huge

[19] Local Market Study, Table 1. The Herfindahl-Hirschman Index ("HHI") is a widely-accepted measure of ownership concentration. The Joint Department of Justice/Federal Trade Commission Horizontal Merger Guidelines use an HHI threshold of 1800 to identify markets in which further inquiry is justified. However, an examination of merger challenges by either federal agency would show that it is a rare case indeed in which a transaction is challenged where the post-merger HHI does not exceed 2200.

inventory[20] and its ability to target audiences, it has the potential to capture a very sizable portion of local advertising revenues. Indeed, the special advantages of cable as a local advertising medium were underscored by the Commission staff in its 1991 study of the video marketplace. Among other things, that study observed that cable has a demographic advantage, in that "cable subscribers have higher incomes and more education, on average, than the general population, and consume more of many advertised goods and services, making cable subscribers desirable targets for advertisers."[21] The staff's prescience on this point is demonstrated by the fact that basic cable's share of local television advertising revenues has grown steadily, from 2.2% in 1985 to 4.7% in 1990 to 6.6% in 1993 to an estimated 7.9% in 1995,[22] and shows no sign of flattening out. In the Television Ownership Further Notice, the Commission itself included cable, as well as local newspapers, in its proposed local advertising product market,[23] and the Joint Economic Study persuasively demonstrates that even this product market is significantly underinclusive, as it disregards other media -- such as yellow pages, outdoor advertising and direct mail -- that are viable substitutes for video and radio advertising.[24] The inclusion of any, let alone all, of these substitute suppliers would obviously reduce the competitive significance of individual broadcast stations, and reduce the HHI levels reported in the Local Market Study.

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[20] A typical cable system has an enormous number of local spots to sell, because it receives local spots in multiple programs among the 30 or more channels it carries.

[21] OPP Report at 131-132.

[22] Id. at 116, Table 24; Joint Economic Study at 20, Table 3; Advertising Age, May 20, 1996, p.22.

[23] Television Ownership Further Notice at ¶ 43.

[24] Joint Economic Study at 23 and Appendix D.

Secondly, as noted above, the calculations in the Local Market Study assume that, following repeal of the one-to-a-market rule, all of the television stations in a market would combine with the maximum allowable number of radio stations in that market. In fact, this level of aggregation is improbable in the extreme. Today, notwithstanding a liberal waiver policy, many television station owners do not own radio stations at all; some which were once extensively involved in radio, such as NBC, have divested large radio groups while retaining their television interests. There is surely no plausible basis for supposing that in a more flexible regulatory setting, every station owner would have the disposition or capacity to pursue cross-ownership.

For these reasons, the concentration levels reported by the Local Market Study almost certainly understate the actual level of competition that would be reasonably likely to occur in any particular market. Even taken at face value, however, the Local Market Study demonstrates that the repeal of the one-to-a-market rule to permit common ownership of one television station and up to eight radio stations in a single community would generate no significant competitive risks. In most of the top 50 markets, the predicted HHI is below the level that, as a practical matter, is likely to generate any antitrust concern; in the remainder, it barely reaches that level. Particularly in view of the highly conservative assumptions underlying its analysis, the Study provides impressive support for the proposition that repeal of the rule would have no cognizable adverse impact on competition in the top 50 markets.

As a potential alternative rationale for repeal of the one-to-a-market rule, the Second Further Notice raises the possibility that radio and television are not truly competitive alternatives for advertisers. The Commission inquires whether this is the case, and if so, whether it justifies elimination of the rule.[25] The short answer, we submit, is that if radio and television are not competitive alternatives, there is absolutely no competitive rationale for a cross-ownership rule; if they are competitive alternatives, newspapers, cable and all the other media seeking advertising dollars must be as well, in which case there is no competitive necessity for a cross-ownership rule. And even if one postulates a decidedly underinclusive market consisting only of radio and television stations, the Local Market Study demonstrates that there is still no competitive justification for a cross-ownership rule in the top 50 markets more stringent than the statutory standards of the 1996 Act.

Finally, it is important to note that, in the highly unlikely event that any particular proposed radio-television transaction might raise unique competitive issues in a particular market because of some confluence of unforeseeable facts, the ordinary process of pre-merger review by the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino procedures is fully capable of identifying and rectifying any competitive problem. The recent series of radio merger investigations and consent decrees emanating from the Department of Justice, including those relating to Westinghouse's acquisition of Infinity Broadcasting Corporation, clearly illustrate this point. Particularly against this backdrop, there is simply no warrant for the Commission to maintain a preemptive structural rule.

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[25] Second Further Notice at ¶ 63.